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COMMENTS

THE UNIFORM CHILD CUSTODY JURISDICTION ACT IN VIRGINIA

I. INTRODUCTION

Due to the dramatic rise over the last decade in the number of child custody disputes between parents who are geographically separated, courts increasingly are faced with interstate litigation and its attendant legal and emotional problems.¹ Because foreign state custody decrees traditionally have been viewed as modifiable and therefore have not been accorded the respect given to final decrees,² parents who lose in one state have been encouraged to seek a more favorable forum in a second state. By employing such self-help methods as "child snatching,"³ a parent can avail himself of a second day in court.

The victims of these interstate battles are, of course, the children who are faced with the very real possibility of being shifted from one home to another, either with or without the court's sanction. Recognizing the essential need for stability and continuity in the life of a child who is affected by divorce,⁴ the National Conference of Commissioners on Uniform Laws formulated the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968.⁵ Virginia's adoption of the UCCJA, effective January 1, 1980,⁶ with the aid and cooperation of the other thirty-seven states that have adopted the Act,⁷ should help put an end to forum shopping and continuing litigation

1. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977) [hereinafter cited as Bodenheimer, *Problems*]. Professor Bodenheimer served as Reporter during the drafting of the Uniform Child Custody Jurisdiction Act by the National Conference of Commissioners on Uniform State Laws.

Common problems in an interstate custody battle include conflicting decrees from different states, child stealing and concealment, and refusal by the noncustodial parent to return the child after an out-of-state visitation. *Id.*

2. See notes 128-134 *infra*, and accompanying text.

3. "Child snatching" occurs when "divorced or separated parents . . . kidnap their own children during or after . . . custody fights." *Kidnappings: A Family Affair*, NEWSWEEK, October 18, 1976, at 24.

4. See generally UNIFORM CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note, 9 UNIFORM LAWS ANN. 111, 112 (1979); J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 37-39 (1973).

5. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 UNIFORM LAWS ANN. 111 (1979) [hereinafter cited as UNIFORM ACT].

6. 1979 Va. Acts, c. 229, codified as VA. CODE ANN. §§ 20-125 to -146 (Cum. Supp. 1979).

7. States having adopted the Uniform Child Custody Jurisdiction Act, the year of adoption, and the statutory reference are as follows: Alaska, 1977, ALASKA STAT. §§ 25.30.010 to

in child custody disputes.

This note will briefly describe the scope and purposes of the UCCJA and its major provisions and will discuss how the UCCJA affects statutory and case law in Virginia.

II. THE SCOPE AND BASIC PURPOSES OF THE UCCJA

The UCCJA is almost exclusively concerned with the procedural interstate workings of child custody proceedings.⁸ Once its jurisdictional prerequisites have been complied with, the Act does not prescribe the subjective weighing of factors used by the court to determine the child's best interests.⁹ After a decision has been reached by the initial forum court, however,

.910 (1977); Arizona, 1978, ARIZ. REV. STAT. §§ 8-401 to -424 (Supp. 1979); Arkansas, 1979, ARK. STAT. ANN. §§ 34-2701 to -2725 (Supp. 1979); California, 1973, CAL. CIV. CODE §§ 5150 to 5174 (West Supp. 1979); Colorado, 1973, COLO. REV. STAT. §§ 14-13-101 to -126 (Supp. 1978); Connecticut, 1978, CONN. GEN. STAT. ANN. §§ 46b-90 to -114 (West Supp. 1979); Delaware, 1976, DEL. CODE tit. 13, §§ 1901 to 1925 (Supp. 1978); Florida, 1977, FLA. STAT. ANN. §§ 61.1302 to .1348 (West Supp. 1978); Georgia, 1979, GA. CODE ANN. §§ 74-501 to -525 (Supp. 1979); Hawaii, 1973, HAW. REV. STAT. §§ 583-1 to -26 (Supp. 1975); Idaho, 1977, IDAHO CODE §§ 5-1001 to -1025 (1979); Illinois, 1979, (reported at 5 FAM. L. REP. (BNA) 4042) (Sept. 11, 1979); Indiana, 1977, IND. CODE ANN. §§ 31-1-11.6-1 to -24 (Burns Supp. 1979); Iowa, 1977, IOWA CODE ANN. §§ 598A.1 to .25 (West Supp. 1979); Kansas, 1979, KAN. STAT. §§ 38-1301 to -1326 (Supp. 1979); Louisiana, 1978, LA. REV. STAT. ANN. §§ 13:1700 to :1724 (West Supp. 1979); Maine, 1979, ME. REV. STAT. ANN. tit. 19, §§ 801 to 825 (Supp. 1979); Maryland, 1975, MD. ANN. CODE art. 16 §§ 184 to 207 (Supp. 1979); Michigan, 1976, MICH. COMP. LAWS ANN. §§ 600.651 to .673 (Supp. 1979); Minnesota, 1977, MINN. STAT. ANN. §§ 518A.01 to .25 (West Supp. 1979); Missouri, 1978, MO. ANN. STAT. §§ 452.440 to .550 (Vernon Supp. 1979); Montana, 1977, MONT. CODE ANN. §§ 40-7-101 to -125 (1979); Nebraska, 1979, NEB. REV. STAT. §§ 43-1201 to -1225 (Supp. 1979); Nevada, 1979, 1979 NEV. STATS. ch. 85; New Hampshire, 1979, H.B. 743; New Jersey, 1979, N.J. STAT. ANN. §§ 2A:34-28 to -52 (West 1979); New York, 1977, N.Y. DOM. REL. LAW §§ 75a-z (McKinney Supp. 1979); North Carolina, 1979, N.C. GEN. STAT. §§ 50A-1 to -25 (Supp. 1979); North Dakota, 1969, N.D. CENT. CODE §§ 14-14-1 to -26 (Repl. Vol. 1971); Ohio, 1977, OHIO REV. CODE ANN. §§ 3109.21 to .37 (Baldwin Supp. 1978); Oregon, 1973, OR. REV. STAT. §§ 109.700 to .930 (Supp. 1977); Pennsylvania, 1977, PA. STAT. ANN. tit. 11, §§ 2301 to 2325 (Purdon Supp. 1979); Rhode Island, 1978, R.I. GEN. LAWS §§ 15-14-1 to -26 (Supp. 1978); South Dakota, 1978, S.D. COMPILED LAWS ANN. §§ 26-5-5 to -52 (Supp. 1979); Virginia, 1979, VA. CODE ANN. §§ 20-125 to -146 (Cum. Supp. 1979); Washington, 1979, 1979 WASH. LAWS ch. 98; Wisconsin, 1976, WISC. STAT. ANN. §§ 822.01 to .25 (West Supp. 1979); Wyoming, 1973, WYO. STAT. §§ 20-5-101 to -125 (Repl. Vol. 1977).

Kentucky has adopted the jurisdictional grounds of the UCCJA, 1976, KY. REV. STAT. ANN. § 403.260 (Baldwin Supp. 1977).

8. Even though the Act is more concerned with the procedural aspects of interstate jurisdiction, it still affects some substantive, intrastate methods used in the adjudicatory process dealing with information gathering. *See, e.g.,* VA. CODE ANN. §§ 20-141, -142 (Cum. Supp. 1979); UNIFORM ACT §§ 18-19.

9. For intrastate custody matters, *see generally* UNIFORM MARRIAGE AND DIVORCE ACT §§ 401-410; H. CLARK, *THE LAW OF DOMESTIC RELATIONS* §§ 17.1 to .7 (1968); Gozansky, *Court-Ordered Investigations in Child Custody Cases*, 12 WILLAMETTE L.J. 511 (1976); Podell &

the Act severely limits the power of the court of a second state to alter a custody decree.¹⁰

The basic purposes of the UCCJA are to avoid the jurisdictional competition marked by child abductions and forum shopping, to discourage continuing custody disputes which disrupt a stable home environment for the child, and to promote interstate assistance in the adjudication of custody matters.¹¹ The provisions of the Act must be read and applied in light of these basic purposes.¹²

First, in order to accomplish its goals, the Act designates one court in the country to assume responsibility for custody decisions affecting a par-

Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (1975); Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51 (1972).

10. See UNIFORM ACT, Commissioners' Prefatory Note.

11. UNIFORM ACT § 1; Comment, 12 U. RICH. L. REV. 745 (1978). Section 1 of the Act lists its specific goals as follows:

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

12. UNIFORM ACT § 1(b) and Commissioners' Note. Virginia, as is its policy when incorporating uniform acts into its Code, has omitted the purposes. Such omission, however, should have no effect on the courts' interpretation of the law in applying the other provisions.

The Supreme Court of South Dakota, another state which has not included Section 1 in its statute, has specifically quoted the entire "Purposes of Act" section to clarify its intention to construe the Act in accordance with the general purposes. *Winkleman v. Moses*, 279 N.W.2d 897 (S.D. 1979).

Virginia also deleted part of § 5 (referring to service of process by mail), § 24 (giving UCCJA cases docket priority), and § 25 (severability clause) of the UNIFORM ACT.

ticular child.¹³ Jurisdiction to modify the decree usually remains vested in this court unless the child and his family no longer have appreciable ties with the original forum state.¹⁴ Selection of the court is based on its access to information about the child and its family. Mere physical presence of the child is not the determinative factor for jurisdiction.¹⁵ Possible jurisdictional conflicts between courts are resolved by deferring to the first court to assume jurisdiction¹⁶ or by application of the *forum non conveniens*¹⁷ or "clean hands" doctrines.¹⁸

Second, other essential information about the child which is out-of-state is channeled into the custody court from less appropriate forums to assure the broadest base possible for making a well-reasoned custody decision.¹⁹ The Act provides for reasonable notice and opportunity to be heard²⁰ to all persons claiming custody of the child²¹ and encourages the appearance of all parties and the child by payment of travel expenses, if necessary.²²

The final result is that all UCCJA states must recognize and enforce the decision of the custody court by giving full faith and credit to a decree reached in substantial compliance with the Act's purposes and provisions.²³

III. THE MAJOR PROVISIONS OF THE UCCJA AND THEIR EFFECT ON VIRGINIA LAW

A. *Jurisdiction*

According to the reasoning of the Restatement, a state has jurisdiction to determine the custody of a child who is:

- (a) domiciled in the state,
- (b) present in the state, or

13. VA. CODE ANN. § 20-126 (Cum. Supp. 1979); UNIFORM ACT § 3 and Commissioners' Notes.

14. VA. CODE ANN. §§ 20-126, -137 (Cum. Supp. 1979); UNIFORM ACT §§ 3, 14 and Commissioners' Notes.

15. VA. CODE ANN. § 20-126 (Cum. Supp. 1979); UNIFORM ACT § 3.

16. VA. CODE ANN. § 20-129 (Cum. Supp. 1979); UNIFORM ACT § 6.

17. VA. CODE ANN. § 20-130 (Cum. Supp. 1979); UNIFORM ACT § 7.

18. VA. CODE ANN. § 20-131 (Cum. Supp. 1979); UNIFORM ACT § 8.

19. VA. CODE ANN. §§ 20-140 to -145 (Cum. Supp. 1979); UNIFORM ACT §§ 17-22.

20. VA. CODE ANN. §§ 20-127, -128 (Cum. Supp. 1979); UNIFORM ACT §§ 4, 5.

21. VA. CODE ANN. § 20-133 (Cum. Supp. 1979); UNIFORM ACT § 10, which joins all claimants in one proceeding.

22. VA. CODE ANN. §§ 20-134, -142(B), -143(C) (Cum. Supp. 1979); UNIFORM ACT §§ 11, 19(b), 20(c).

23. VA. CODE ANN. §§ 20-135, -136 (Cum. Supp. 1979); UNIFORM ACT §§ 12-15.

(c) neither domiciled nor present, if the court has personal jurisdiction over the parties contending for custody.²⁴

This broad view of jurisdiction over custody matters is generally followed in Virginia. The circuit court is not limited to decrees over domiciled children;²⁵ rather it is vested with the power to decide all matters ancillary to a divorce concerning "the care, custody and maintenance of . . . minor children," which includes the decision of with which parent, if either, the child will remain upon dissolution of the marriage.²⁶ Where divorce is not at issue, the juvenile and domestic relations district court has jurisdiction to conduct proceedings involving controversies over custody, visitation or support, and situations in which the child has been abandoned, neglected or abused.²⁷

Under Virginia case law, the court of a minor's domicile has power to determine custody.²⁸ Additionally, the child's mere presence in the state constitutes a sufficient basis for the exercise of jurisdiction over the child for custody purposes, whether or not he is a domiciliary of Virginia.²⁹ At the other extreme, the court in a divorce proceeding may award custody of a minor child who is not domiciled, nor even present, in Virginia.³⁰ If the court has *in personam* jurisdiction over both parents, it has full authority to issue a personal decree binding between the husband and wife.³¹

Under the UCCJA, the permissible grounds for the court's jurisdiction remain the same, but the exercise of that jurisdiction is somewhat narrowed. The Virginia Code provides four general tests for determining whether Virginia has jurisdiction to grant an initial custody decree.³²

24. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

25. See generally A. PHELPS, DOMESTIC RELATIONS IN VIRGINIA (3d ed. 1977), §§ 23-1 to -3, 23-5 to -7.

26. VA. CODE ANN. § 20-107 (Cum. Supp. 1979); see also § 20-79 (Cum. Supp. 1979).

27. VA. CODE ANN. § 16.1-241 (Cum. Supp. 1979). In custody, support or visitation cases, "[j]urisdiction [of the juvenile and domestic relations district court] shall be concurrent with and not exclusive of courts having equity jurisdiction, as provided in § 16.1-244. . . ." *Id.* The initial right to determine custody is transitory, shifting with the abode of the child. *White v. White*, 181 Va. 162, 24 S.E.2d 448 (1943). However, once jurisdiction is acquired by a court in a divorce proceeding over the custody and maintenance of the child of the parties, other Virginia courts are precluded from exercising jurisdiction. *Williams v. Woolfolk*, 188 Va. 312, 49 S.E.2d 270 (1948); VA. CODE ANN. §§ 16.1-242, -244 (Cum. Supp. 1979).

28. See *Rogers v. Commonwealth*, 176 Va. 355, 11 S.E.2d 584 (1940) (though such jurisdiction is not exclusive).

29. *Falco v. Grills*, 209 Va. 115, 161 S.E.2d 713 (1968).

30. *Gramelspacher v. Gramelspacher*, 204 Va. 839, 134 S.E.2d 285 (1964).

31. *Id.* at 844, 134 S.E.2d at 289.

32. VA. CODE ANN. § 20-126 (Cum. Supp. 1979) provides the grounds for jurisdiction:

A. A court of this State which is competent to decide child custody matters has

The first, and most common, basis requires Virginia to be the "home state" of the child; that is, the state where the child has lived on a continuous basis for the six months before commencement of the proceeding.³³ A six-month extension of this original home state jurisdiction is provided when the child is taken from Virginia by a person claiming custody.³⁴ The application of this clear-cut, six-month standard³⁵ has proven simple for most courts.³⁶

In divorce cases involving children living continually with a parent who

jurisdiction to make a child custody determination by initial or modification decree if:

1. This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

2. It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

3. The child is physically present in this State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

4. (i) It appears no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs 1, 2, or 3, or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

B. Except under paragraphs 3 and 4 of subsection A physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

C. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

33. VA. CODE ANN. § 20-126(A)(1) (Cum. Supp. 1979); UNIFORM ACT § 3(a)(1). In the case of a child less than six months old, his "home state" is the one in which he has lived since birth with his parents, parent or person acting as parent. VA. CODE ANN. § 20-125(5) (Cum. Supp. 1979); UNIFORM ACT § 2(5).

34. VA. CODE ANN. § 20-126(A)(1) (Cum. Supp. 1979); UNIFORM ACT § 3(a)(1).

35. UNIFORM ACT § 3, Commissioners' Note; the Commissioners have adopted Professor Ratner's finding that "[m]ost American children are integrated into an American community after living there six months." Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 818 (1964).

36. Compare *Howard v. Gish*, 36 Md. App. 446, 373 A.2d 1280 (1977) and *Thomas v. Thomas*, 36 Colo. App. 96, 537 P.2d 1095 (1975) with *Wheeler v. District Court*, 186 Colo. 218, 526 P.2d 658 (1974).

is a domiciliary of Virginia, Virginia's jurisdiction remains unaffected.³⁷ Where the child is presently a domiciliary of another state or has been such within the six months prior to moving to Virginia, however, the court will be unable to determine custody under the "home state" test merely on the basis of *in personam* jurisdiction over the parents and/or the presence of the child.³⁸ It must find a basis under one of the other tests given in the Virginia Code.³⁹ Additionally, mere presence of the child will no longer constitute sufficient grounds for assuming jurisdiction,⁴⁰ eliminating the reasoning in *Falco v. Grill*.⁴¹ As in the past, however, the physical presence of the child, though highly desirable, is not absolutely required for a valid determination of custody.⁴² If, for example, the child is away at summer school, Virginia will still retain jurisdiction.⁴³

A second test for jurisdiction is that the child and at least one parent have a "significant connection" with the forum state *and* that "substantial evidence" exists in the state, making the exercise of such jurisdiction "in the best interests of the child."⁴⁴ The "significant connection/substantial evidence" test provides an alternative when there is no forum which meets the "home state" requirement or when there are equal or stronger ties with another state.⁴⁵ Virginia's three present bases of jurisdiction⁴⁶ will continue

37. VA. CODE ANN. § 20-97 (Cum. Supp. 1979).

38. VA. CODE ANN. § 20-126(B) (Cum. Supp. 1979); UNIFORM ACT § 3(b); *see, e.g.*, Sagan v. Sagan, 5 FAM. L. REP. (BNA) 2256 (Pa. Super. Ct. 1978).

39. VA. CODE ANN. § 20-126 (Cum. Supp. 1979). *See, e.g.*, Fry v. Ball, 190 Colo. 128, 544 P.2d 402 (1975) (decided under the "significant connection" test of UNIFORM ACT § 3(a)(2); VA. CODE ANN. § 20-126(A)(2) (Cum. Supp. 1979)). *See* note 44 *infra* and accompanying text.

40. VA. CODE ANN. § 20-126(B) (Cum. Supp. 1979); UNIFORM ACT § 3(b).

41. 209 Va. 115, 161 S.E.2d 713 (1968). The Virginia court took jurisdiction of a child whose parents, New York citizens, were killed in a car wreck in Staunton. Although a New York court had given an *ex parte* guardianship order to a New York uncle, the Virginia court granted custody to an uncle in Tennessee, basing its jurisdiction solely on presence.

Using chapter 7, Virginia could still qualify for jurisdiction under the "emergency" provisions of § 20-126(3). Whether or not the court *should* exercise such jurisdiction, however, would still have to be determined under the other provisions of the chapter, *e.g.*, §§ 20-129, -130, -131, -136 and -137.

42. VA. CODE ANN. § 20-126(C) (Cum. Supp. 1979); UNIFORM ACT § 3(c).

43. If the child is away at school for more than six months, however, Virginia must find jurisdiction through the strong contacts of the second test. *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1226 n.74 (1969) [hereinafter cited as Bodenheimer, *Legislative Remedy*].

44. VA. CODE ANN. § 20-126(A)(2) (Cum. Supp. 1979); UNIFORM ACT § 3(a)(2).

45. UNIFORM ACT § 3, Commissioners' Note; *In re McDonald*, 74 Mich. App. 119, 253 N.W.2d 678, 681 (1977). *See also* Smith v. Superior Court, 68 Cal. App. 3d 457, 137 Cal. Rptr. 348 (1977) (wife and child were residents of Oregon, but California continued to have sufficiently strong ties to modify custody).

46. *See* notes 28-31 *supra* and accompanying text.

under the "significant connection/substantial evidence" test, but they may no longer be applied as freely.

Although the statutory language is very general in order to be flexible enough to cover a wide range of fact situations, the test is expressly limited by part (B) of this section which stresses that "physical presence in this State of the child . . . is not alone sufficient to confer jurisdiction. . . ."⁴⁷ As the Commissioner's Note to the Uniform Act points out, "[Section 20-126(B)] perhaps more than any other provision . . . requires that it be interpreted in the spirit of the legislative purposes There must be maximum rather than minimum contact with the state. . . . [S]ubmission of the parties to the forum . . . is not sufficient without additional factors establishing closer ties with the state."⁴⁸

Typically, original jurisdiction under this test will be available in those instances where the family has moved frequently with no state qualifying for "home state" status.⁴⁹ It will also apply where the child and one parent have moved from the home within six months, but the other parent has left also, leaving no significant connection with the state.⁵⁰

In more complicated situations, the facts of the individual case must show that Virginia is the most appropriate forum for deciding the child's future relationships. An example of possible alternative jurisdiction would be the one in which a great deal of the child's life had been spent in Virginia before the family moved to another state for six months or more. If the wife then returned to Virginia with the child, the Virginia court might well have jurisdiction concurrent with the home state which would allow Virginia to entertain the wife's petition for custody.⁵¹ Although concurrent jurisdiction would exist, both states may not exercise it; therefore, if the stay-at-home husband sued in his state within the six-month extension period, the less appropriate court must surrender its jurisdiction.⁵² Jurisdictional conflicts are to be avoided by the application of the Act's priority-in-time⁵³ and inconvenient forum rules.⁵⁴

47. VA. CODE ANN. § 20-126(B) (Cum. Supp. 1979); UNIFORM ACT § 3(b).

48. UNIFORM ACT § 3, Commissioners' Note.

49. *Id.* Cf. *Mayer v. Mayer*, 5 FAM. L. REP. (BNA) 2749 (Wisc. App. June 29, 1979) where, although the Wisconsin court retained jurisdiction as the home state because the stay-at-home father filed proceedings within six months of the wife's departure, his move to Minnesota thereafter presented a question for the trial court to consider whether the child's ties to Wisconsin had been sufficiently weakened for *forum non conveniens* grounds to apply.

50. UNIFORM ACT § 3, Commissioners' Note.

51. *Id.*; Bodenheimer, *Legislative Remedy*, *supra* note 43, at 1226-27.

52. UNIFORM ACT § 3, Commissioners' Note. See *Mort v. Mort*, 365 So.2d 194 (Fla. Dist. Ct. App. 1978).

53. VA. CODE ANN. § 20-129 (Cum. Supp. 1979); UNIFORM ACT § 6.

54. VA. CODE ANN. § 20-130 (Cum. Supp. 1979); UNIFORM ACT § 7.

In spite of these specific limitations, however, court decisions, especially in some of the earlier cases under the UCCJA, have resulted in such disparate interpretations of Section 20-126(B) as to find jurisdiction when the child and its guardian had lived out of the forum state for more than six months⁵⁵ and when the child had never lived in the forum state at all.⁵⁶ Although the rulings on this second test have been largely consistent with the purposes of the Act,⁵⁷ much of the criticism leveled at the UCCJA has

55. See *Fry v. Ball*, 190 Colo. 128, 544 P.2d 402 (1975), in which the Colorado court deferred to California's jurisdiction, in spite of the fact that the child and his guardian had lived in Colorado for more than the six months necessary to meet the home state requirement. The significant connections found by the court included the child's presence in California for three of his four years, the initial granting of guardianship in California, the access to considerable information about the child by California social agencies, and the California domicile of the parents. 544 P.2d at 406. With all of these connections, California was deemed to have the substantial evidence necessary to determine who should provide future care, affection and security for the child.

Additional factors existed in *Fry*, however, which rendered the immediate compliance with the foreign decree in favor of the natural parents undesirable. The father had been convicted of selling narcotics; the mother was being treated for heroin addiction; the child feared his father; and the parents had violently tried to seize physical custody of the boy from his guardian grandmother. 544 P.2d at 404-05. Because of these extenuating circumstances, the Colorado court granted temporary custody to the grandmother, allowing her to retain the child pending adjudication in California on the merits. The rights of the natural parents were safeguarded by the court's condition that if the guardian failed to institute modification proceedings in California within fifty days, the temporary order would terminate. 544 P.2d at 408. Whatever the final action on the petition, however, the Colorado court stressed that it would "stand ready to aid the [California] Superior Court, consistent with the letter and spirit of the . . . Act." *Id.*

Although no specific statutory authority was cited for the Colorado court's course of action other than its general equity powers, the result was reached in the spirit of the UCCJA by its combination of "temporary protection of the child . . . with an offer of interstate judicial cooperation." Bodenheimer, *Problems*, *supra* note 1, at 992. Professor Bodenheimer further praises "[t]his venture in interstate cooperation [which] demonstrates how the Act permits a court to safeguard the child and still prevent forum shopping by the loser in a custody contest." *Id.*

Cf. *Thomas v. Thomas*, 36 Colo. App. 96, 537 P.2d 1095 (1975) (Colorado father claimed jurisdiction existed for the Colorado court under "significant connection" and "emergency" to modify decree of child's home state, Kansas. A temporary custody decree was granted, pending hearing on the merits, after which it was dissolved and jurisdiction was declined).

56. See, e.g., *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974) (blatantly misinterpreting "significant connection" element of § 3(a)(2), as giving the Colorado court jurisdiction to modify an Oklahoma decree, although the child was only visiting outside his home state of Montana).

57. *Fry v. Ball*, 190 Colo. 128, 544 P.2d 402 (1975); *Vanneck v. Vanneck*, ____ App. Div. ____, 417 N.Y.S.2d 258 (1979); see generally Bodenheimer, *Problems*, *supra* note 1. *Cf.* *Carson v. Carson*, 29 Or. App. 861, 565 P.2d 763 (1977) (although the Oregon court said there must be "optimum access," it found the statute's language to be "practically impossible [to apply in order] to determine . . . the more preferable forum." *Id.* at 865, 565 P.2d at 767). But see *Giddings v. Giddings*, 228 N.W.2d 915 (N.D. 1975).

been because of the vagueness of this test,⁵⁸ as well as the emergency test.⁵⁹ According to its critics, the jurisdictional standards of Section 3, augmented by the Commissioner's comments, give insufficient guidance, thus allowing courts "to indulge their prejudices as freely as before."⁶⁰ However, as more and more states enact the UCCJA and their courts perceive themselves as "links in an interstate—and even international—network of courts,"⁶¹ the initial ambiguities appear gradually to be replaced by "a substantial degree of unanimity and harmony"⁶² in the interpretation of this section. Virginia will have the guidance of the many recent cases in the last year or two which have defined more strictly the requirements for establishing jurisdiction and, more importantly, for exercising it.⁶³

Under the third test, a Virginia court may take jurisdiction in an emergency situation based solely on the physical presence of the child in the state.⁶⁴ When a child requires immediate protection,⁶⁵ such jurisdiction is consistent with the traditional *parens patriae* role of the court to protect children within Virginia's borders.⁶⁶ The provisions of Section 20-126(A)(3) make this an exceptional jurisdictional test with a very limited scope, "reserved for extraordinary circumstances When there is child neglect without emergency or abandonment, jurisdiction cannot be based on this [test]."⁶⁷

Most reported requests for emergency jurisdiction so far have been at-

58. Comment, 48 COLO. L. REV. 603 (1977); Note, *Family Law: Court's Adoption of Uniform Child Custody Jurisdiction Act Offers Little Hope of Resolving Child Custody Conflicts*, 60 MINN. L. REV. 820 (1976).

59. VA. CODE ANN. § 20-126(A)(3) (Cum. Supp. 1979); UNIFORM ACT § 3(a)(3). See *infra* notes 64-76 and accompanying text.

60. Note, 60 MINN. L. REV. 820 (1976); Comment, 48 COLO. L. REV. 603 (1977).

61. Bodenheimer, *Problems*, *supra* note 1, at 981.

62. *Id.* at 1014.

63. As late as 1977, only ten states had adopted the Act, therefore, until recently there has been only a limited number of published appellate decisions to guide courts in applying the Act's principles. See note 7 *supra* for current listing of states. See also Note, *McDonald v. McDonald: Michigan Applies The Uniform Child Custody Jurisdiction Act*, 1978 DET. C. OF L. REV. 123, 124 n.10 (lists the sixteen cases interpreting the Act existing at that time).

64. VA. CODE ANN. § 20-126(A)(3), (B) (Cum. Supp. 1979); UNIFORM ACT § 3(a)(3), (b).

65. UNIFORM ACT § 3, Commissioners' Note.

66. The state's power to act for a child's protection and welfare has been recognized since the seventeenth century in the English common law. See H. CLARK, *LAW OF DOMESTIC RELATIONS* § 17.1 (1968). American courts have continued this tradition. See, e.g., *Finley v. Finley*, 240 N.Y. 429, 148 N.E. 624 (1925), a leading American case in which Justice Cardozo stresses the duty of the state as *parens patriae* to the incompetent and helpless. *Accord*, *Rogers v. Commonwealth*, 176 Va. 355, 11 S.E.2d 584 (1940). Additionally, statutes such as VA. CODE ANN. §§ 16.1-246, -251 (Cum. Supp. 1979) specifically deal with the child's welfare in emergency situations.

67. UNIFORM ACT § 3(a)(3), Commissioners' Note.

tempts to modify another state's custody orders by circumventing the requirements of the first and second tests.⁶⁸ Occasionally, however, circumstances will exist where original jurisdiction may rightfully be invoked. Abandonment, of course, will give Virginia its traditional power over the child's custody.⁶⁹ In other cases, the facts will have to show an actual risk of danger, such as abduction or violence, to invoke jurisdiction under Section 20-126(A)(3). For example, W, after one of many marital quarrels with H, leaves their home state with their child to seek refuge in Virginia. If H follows to continue the feud, the situation between the parents might well be volatile enough to require emergency intervention by the Virginia court for the protection of the child. Virginia, of course, is unable under the Act to determine custody under the first two tests, but it may award temporary custody to W (or H) on the condition that she return the child to the home state for adjudication of custody in the proper forum.⁷⁰

Similarly, if the danger to the child exists in the home state,⁷¹ Virginia could maintain temporary jurisdiction and initiate procedures to inform the court with primary jurisdiction of the allegations and circumstances concerning the child's well-being.⁷² If the court employs strict time constraints,⁷³ along with the expense penalties allowed by the Act⁷⁴ and the requirement of substantiation of allegations,⁷⁵ the possibility of abuse under the emergency test will be greatly reduced.⁷⁶

Finally, the fourth test supplies a residual jurisdiction when there appar-

68. See, e.g., *Neal v. Superior Court*, 84 Cal. App. 3d 847, 148 Cal. Rptr. 841 (1978) (mother requested "emergency" custody because child's allergies had improved dramatically after three-week visit in California); *Young v. District Court*, ____ Colo. ____, 570 P.2d 249 (1977) (father's general statements that child was "in bad circumstances" with custodial mother did not qualify as "emergency").

69. *Falco v. Grills*, 209 Va. 115, 161 S.E.2d 713 (1968).

70. See *Balkie v. Balkie*, No. D-12-38-03 (Super. Ct., Orange County, Calif. Feb. 25, 1977), a case decided on similar facts, discussed in Bodenheimer, *Problems, supra* note 1, at 993 n. 95.

71. *Young v. District Court*, ____ Colo. ____, 570 P.2d 249 (1977); *Fry v. Ball*, 190 Colo. 128, 544 P.2d 402 (1975); *Thomas v. Thomas*, 36 Colo. App. 96, 537 P.2d 1095 (1975).

72. VA. CODE ANN. §§ 20-142, -143 and -144 (Cum. Supp. 1979); UNIFORM ACT §§ 19, 20 and 21.

73. *Fry v. Ball*, 190 Colo. 128, 544 P.2d 402 (1975); *Zillmer v. Zillmer*, 8 Wisc.2d 657, 101 N.W.2d 703 (1960) (decided before Act was proposed, but allowed temporary emergency jurisdiction while requiring immediate return to the original forum state).

74. VA. CODE ANN. § 20-130(G) (Cum. Supp. 1979); UNIFORM ACT § 7(g).

75. VA. CODE ANN. § 20-132 (Cum. Supp. 1979); UNIFORM ACT § 9.

76. But see Hudak, *Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 Mo. L. REV. 521, 547 (1974); Comment, 48 COLO. L. REV. *supra* note 58 at 614-15; Note, 60 MINN. L. REV. *supra* note 58 at 832-35. These commentators feel that the imprecise guidelines of the UCCJA, along with their initial misapplication by some courts, hinder the accomplishment of the Act's purposes.

ently is no other state which has jurisdiction or when another state declines to assume jurisdiction because Virginia is deemed the more appropriate forum *and* the child's best interests require Virginia to assume jurisdiction.⁷⁷ If these prerequisites are met, the physical presence of the child will be sufficient for the exercise of jurisdiction.⁷⁸

Overlaying all the grounds of original jurisdiction is the Act's purpose of avoiding "jurisdictional competition."⁷⁹ This purpose is manifested by providing that Virginia cannot exercise jurisdiction if there is a pending custody proceeding in another state unless that court stays its proceedings in favor of Virginia.⁸⁰ It is incumbent upon Virginia to determine if such foreign state actions are extant;⁸¹ if they are, Virginia must stay its proceeding and communicate with the foreign state court to resolve which forum is more appropriate.⁸²

By placing the burden on Virginia to take an active part in the communication process, Section 20-129 helps carry out the UCCJA's goal of preventing interstate conflicts with the ensuing harmful effects on the child's well-being.⁸³

B. *Modification of Custody Decrees*

Although Section 20-126 establishes the bases for subject matter jurisdiction, it must be applied in conjunction with Section 20-137,⁸⁴ which prohibits modification of custody decrees by a second state as long as the jurisdiction of the original decreeing state continues.⁸⁵ The recognition given to a decree of the original forum state by a sister state, although closely interwoven with the modification aspects of custody jurisdiction, will be discussed in part C.

1. *Decrees Rendered by Virginia Courts*

When a Virginia court acquires jurisdiction to award custody of a child,⁸⁶ that jurisdiction is continuous and exclusive, and its decree is never final

77. VA. CODE ANN. § 20-126(A)(4) (Cum. Supp. 1979); UNIFORM ACT § 3(a)(4).

78. VA. CODE ANN. § 20-126(B) (Cum. Supp. 1979); UNIFORM ACT § 3(b).

79. UNIFORM ACT § 1(a)(1).

80. VA. CODE ANN. § 20-129(A) (Cum. Supp. 1979); UNIFORM ACT § 6(a).

81. The court must examine the pleadings, affidavits and registry of out-of-state decrees and proceedings. VA. CODE ANN. §§ 20-132, -139 (Cum. Supp. 1979); UNIFORM ACT §§ 9, 16.

82. VA. CODE ANN. § 20-129(C) (Cum. Supp. 1979); UNIFORM ACT § 6(c).

83. UNIFORM ACT § 6, Commissioners' Note; *see* Paltrow v. Paltrow, 37 Md. App. 191, 376 A.2d 1134 (1977).

84. UNIFORM ACT § 14.

85. UNIFORM ACT § 14, Commissioners' Note.

86. VA. CODE ANN. §§ 20-107, -108, 16.1-241 (Cum. Supp. 1979).

until the child reaches majority.⁸⁷ This jurisdiction precludes any other court in the state from modifying the original decree, even upon a writ of habeas corpus.⁸⁸ Once a decree is issued, the Virginia court retains jurisdiction to modify that decree even if the child is taken from the state.⁸⁹

Enactment of the UCCJA has no effect upon the intrastate workings of Virginia's courts;⁹⁰ however, a court's power to modify its original decree once the child has left the state with one parent will now cease unless the circumstances continue to meet one of the four jurisdictional tests of Section 20-126.⁹¹ Again, the six-month "home state" test is easy to apply as is its six-month extension.⁹² Considerably less definite, though, is Virginia's ability to extend its power to modify its own decrees under the "significant connection/substantial evidence" test. Once a child has been removed from the state, the length of time that Virginia retains jurisdiction will vary depending to a great extent upon the circumstances of the child's removal and the amount of time passed.⁹³

According to the Commissioners' Note, another state would not achieve modification status merely by fulfilling the "home state" requirements.⁹⁴ It must defer to Virginia as long as sufficient factors favor Virginia's continuing jurisdiction.⁹⁵ The fact that Virginia had previously held a full hearing to determine the best interests of the child may well be an important factor in prolonging jurisdiction.⁹⁶

87. *Hammers v. Hammers*, 216 Va. 30, 216 S.E.2d 20 (1975); *Morris v. Henry*, 193 Va. 631, 70 S.E.2d 417 (1952); *Gloth v. Gloth*, 154 Va. 511, 153 S.E. 879 (1930); VA. CODE ANN. §§ 20-108, 16.1-242 (Cum. Supp. 1979).

88. *Williams v. Woolfolk*, 188 Va. 312, 49 S.E.2d 270 (1948); VA. CODE ANN. §§ 16.1-244, 20-107 (Cum. Supp. 1979).

89. *Kern v. Lindsey*, 182 Va. 775, 30 S.E.2d 707 (1944).

90. *Adams v. Adams*, 5 FAM. L. REP. (BNA) 2776 (Fla. Ct. App., July 10, 1979).

91. See note 32 *supra*.

92. See notes 33-36 *supra* and accompanying text. In *re Zumbrun*, ____ Colo. App. ____, 592 P.2d 16 (1979) (New Mexico continued its modification jurisdiction because it was the child's home state at the commencement of the proceeding).

93. Professor Bodenheimer, in her study of child custody problems, argues forcefully that modification jurisdiction should be flexible, allowing three or four years before cutting off the original forum's jurisdiction as the facts necessitate, especially if the innocent parent has been unable to locate the child. Bodenheimer, *Problems*, *supra* note 1, at 988-89.

94. UNIFORM ACT § 14, Commissioners' Note.

95. VA. CODE ANN. § 20-137 (Cum. Supp. 1979); UNIFORM ACT § 14.

96. *Id.* See *Smith v. Superior Court*, 68 Cal. App. 3d 457, 137 Cal. Rptr. 348 (1977), where California retained jurisdiction to modify its original decree although the mother and child had subsequently lived in Oregon for five years. The court held that the child still had equal or stronger ties with the original forum, as all other relatives were in California. But see *Clark v. Superior Court*, 73 Cal. App. 3d 300, 140 Cal. Rptr. 709 (1977) (similar facts, but dissimilar holding. Mother and child had lived in Oregon for five years, but this time California stayed its proceedings on inconvenient forum grounds.); see also *Schlumpf v. Superior Court*, 79 Cal.

If the child re-enters the forum state to visit the noncustodial parent who has remained behind a delicate question is presented. Does Virginia have the right to modify its original decree in favor of its citizen if no other action is pending in a more appropriate forum? A similar problem was recently faced by the Oregon appellate court⁹⁷ which concluded that since a considerable period of time had passed (two years), the trial court should decline to exercise its authority under the guidelines of the inconvenient forum provisions.⁹⁸ Virginia, likewise, could stay or dismiss the action of the noncustodial parent under Section 20-130⁹⁹ which provides "flexibility to some of the Act's more rigid rules . . . [as] an excellent mechanism to avoid jurisdictional conflict."¹⁰⁰

When all claimants and the child leave the state, Virginia's authority to modify becomes much more tenuous. It is not enough in itself that the parties to the action subject themselves to the court's jurisdiction. The court must be certain that no other state is a more appropriate forum to decide the child's present and future welfare.¹⁰¹

If a child is wrongfully removed from the state, Virginia's jurisdiction would usually continue for a longer period of time than if lawfully removed, which is consistent with the purposes of the Act.¹⁰² Other UCCJA states could deny the wrong-doer access to their courts because of his conduct¹⁰³

App. 3d 892, 145 Cal. Rptr. 190 (1978) (nine-year absence from state was too long to retain jurisdiction).

Although the Act generally addresses problems concerning the unlawful actions of the noncustodial parent, it is a two-edged sword to be used to prevent violations of custody decrees by the parent who has been given the child. Where the mother had agreed to allow visitation by the father as per the court order, then had secreted the child in Minnesota for twenty months, New York retained jurisdiction to modify its original decree. *Policastro v. Policastro*, 5 FAM. L. REP. (BNA) 2427 (N.Y. Sup. Ct. Feb. 6, 1979).

97. *Moore v. Moore*, 24 Or. App. 673, 546 P.2d 1104 (1976).

98. *Id.* at 680, 546 P.2d at 1109. See also *Policastro v. Policastro*, 5 FAM. L. REP. (BNA) 2427 (N.Y. Sup. Ct. Feb. 6, 1979); *Clark v. Superior Court*, 73 Cal. App. 3d 300, 140 Cal. Rptr. 709 (1977).

99. VA. CODE ANN. § 20-130 (Cum. Supp. 1979); UNIFORM ACT § 7.

100. Bodenheimer, *Problems*, *supra* note 1, at 997. See *In re Kern*, 87 Cal. App. 3d 402, 150 Cal. Rptr. 860 (1979), for an illustration of § 20-130's flexibility. Although the child had lived outside the initial forum state for less than six months, the court of appeals refused to allow the resident noncustodial parent to relitigate in California after she had wrongfully retained the child after a visit from the father in Rhode Island.

101. See *Campbell v. Campbell*, ____ Ind. App. ____, 388 N.E.2d 607 (1979) (the court, remanding for consideration of whether the trial court had jurisdiction under the Act, lambasted the lawyers and the lower court for not knowing and/or applying the Act at all).

102. UNIFORM ACT § 1.

103. VA. CODE ANN. § 20-131 (Cum. Supp. 1979); UNIFORM ACT § 8. See, e.g., *In re Anonymous*, 92 Misc. 2d 280, 401 N.Y.S.2d 438 (1978), where, although the UCCJA had been passed but was not yet effective, New York refused jurisdiction, frowning on the plaintiff's "lawless

or on the additional grounds of *forum non conveniens*.¹⁰⁴

Section 20-137, which prohibits modification decrees, must be read together with Section 20-126.¹⁰⁵ "Any other reading of the Act would subvert its purposes by permitting a kidnapper to go into hiding for six months and then seek modification. . . . The Act does not support an interpretation which would encourage the very evils the Commissioners on Uniform State Laws intended to eradicate."¹⁰⁶

2. Decrees Rendered by Other Courts

Because custody decrees have traditionally been viewed as subject to revision based on a showing of changed circumstances¹⁰⁷ or on the welfare of the child,¹⁰⁸ Virginia has displayed no hesitancy to modify a sister state's orders.¹⁰⁹ In fact, Virginia has apparently gone a step further, finding that a foreign decree is susceptible to an independent determination by Virginia courts, as "[w]e are not required to give full faith and credit to child custody decrees of another state."¹¹⁰ By emphasizing that the welfare of the child is the controlling consideration in a custody contest,¹¹¹ Virginia courts retain wide discretion to modify foreign decrees.¹¹²

Under Section 20-137 of the Act,¹¹³ Virginia must now refuse to modify a custody decree of another state unless Virginia meets the jurisdictional tests of Section 20-126 and the original forum state either no longer appears to have proper jurisdiction or has declined that jurisdiction to modify.¹¹⁴

self-help." 401 N.Y.S.2d at 439; *In re Shalit*, 4 FAM. L. REP. (BNA) 2035 (N.Y. Sup. Ct. Nov. 1, 1977).

104. VA. CODE ANN. § 20-130 (Cum. Supp. 1979); UNIFORM ACT § 7.

105. UNIFORM ACT § 14, Commissioners' Note.

106. Bodenheimer, *Problems*, *supra* note 1, at 988.

107. *E.g.*, *Hammers v. Hammers*, 216 Va. 30, 216 S.E.2d 20 (1975).

108. *Semmes v. Semmes*, 201 Va. 117, 109 S.E.2d 545 (1959); *see also* *Portewig v. Ryder*, 208 Va. 791, 160 S.E.2d 789 (1968).

109. *See, e.g.*, *Addison v. Addison*, 210 Va. 104, 168 S.E.2d 281 (1969) (in which the court felt free to change a final decree of the South Carolina court due to changed circumstances).

110. *Osborne v. Osborne*, 215 Va. 205, 213, 207 S.E.2d 875, 882 (1974) (holding specifically that Virginia could order a change in child support payments without requiring a showing of changed conditions).

111. *See, e.g.*, *Brown v. Brown*, 218 Va. 196, 237 S.E.2d 89 (1977); *Branham v. Raines*, 209 Va. 702, 167 S.E.2d 355 (1969); *Mullen v. Mullen*, 188 Va. 259, 49 S.E.2d 349 (1948); VA. CODE ANN. § 31-15 (Repl. Vol. 1979).

112. *See* notes 110 and 111 *supra* and accompanying text.

113. VA. CODE ANN. § 20-137 (Cum. Supp. 1979); UNIFORM ACT § 14.

114. VA. CODE ANN. § 20-137(A) (Cum. Supp. 1979); UNIFORM ACT § 14(a). *See In re Zumbun*, — Colo. App. —, 592 P.2d 16 (1979), where the Colorado court held that it did not have jurisdiction to modify a foreign decree. Even though New Mexico was not a UCCJA state, it had initial jurisdiction in substantial conformity with the Act and it had not declined jurisdiction.

Once again, Virginia must follow the guidelines for determining whether there are simultaneous proceedings in other states before exercising its jurisdictional power.¹¹⁵ Next, Virginia must apply Section 20-131(B),¹¹⁶ the "clean hands" portion of the Act, and refuse access to a petitioner who has either illegally removed or retained a child in violation of a custody decree.¹¹⁷ If, after all these considerations, the court is authorized to modify a foreign custody decree, it must still give "due consideration to . . . all previous proceedings. . . ."¹¹⁸

The Act's codification of the "clean hands" doctrine¹¹⁹ in modification suits, Section 20-131(B),¹²⁰ operates as a strong deterrent to a parent who employs self-help measures. Not only will a court usually decline jurisdiction, except in an actual emergency,¹²¹ it may also impose financial penalties in the form of travel expenses and attorney's fees on a petitioner who tries to contravene the policies of the Act.¹²²

"Unclean hands" has provided the rationale for the courts to deny modification jurisdiction in cases where one parent removed the child from the forum state pending the custody hearing,¹²³ where the Act had been passed but was not yet effective,¹²⁴ and where the wrongful behavior had taken place in an international setting.¹²⁵ The doctrine has also been used to

115. VA. CODE ANN. § 20-129 (Cum. Supp. 1979); UNIFORM ACT § 6.

116. VA. CODE ANN. §§ 20-137(B), -131(B) (Cum. Supp. 1979); UNIFORM ACT §§ 14(b), 8(b).

117. VA. CODE ANN. § 20-131(B) (Cum. Supp. 1979); UNIFORM ACT § 8(b).

118. VA. CODE ANN. § 20-137(B) (Cum. Supp. 1979); UNIFORM ACT § 14(b). Consideration of the previous findings is not discretionary. "[Virginia] shall" use the transcripts and other documents from its sister court(s) which have been preserved in accordance with UCCJA mandates, VA. CODE ANN. § 20-144 (Cum. Supp. 1979); UNIFORM ACT § 21, and are to be requested for use by states in subsequent proceedings, VA. CODE ANN. § 20-145 (Cum. Supp. 1979); UNIFORM ACT § 22. VA. CODE ANN. § 20-137(B) (Cum. Supp. 1979); UNIFORM ACT § 14(b) (emphasis added). This information about the child and his history will give the modifying court a clearer, more complete picture of the child and his relationships, especially in relation to the out-of-state claimant. UNIFORM ACT § 18, Commissioners' Note. Cf. *In re Verbin*, — Wash. —, 595 P.2d 905 (1979) (Washington court held it could modify because original forum court did not have all significant factors about child's best interests before it).

119. See generally Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 357-74 (1953).

120. VA. CODE ANN. § 20-131(B) (Cum. Supp. 1979); UNIFORM ACT § 8(b).

121. The Act's language is "unless required in the interest of the child." *Id.* The harm done to the child must be greater than the misconduct of the parent; otherwise, the refusal of modification jurisdiction is mandatory. UNIFORM ACT § 8, Commissioners' Note.

122. VA. CODE ANN. § 20-131(C) (Cum. Supp. 1979); UNIFORM ACT § 8(c). Cf. *In re Schwander*, 79 Cal. App. 3d 1013, 145 Cal. Rptr. 325 (1978) (although refusing to modify for lack of emergency jurisdiction, the court reprimanded the petitioners for their "transcontinental gameship," *id.* at 1021, 145 Cal. Rptr. at 330, and imposed a \$1,500.00 penalty).

123. *Barcus v. Barcus*, 278 N.W.2d 646 (Iowa 1979).

124. *Nehra v. Uhlir*, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977).

125. *In re Shalit*, 4 FAM. L. REP. (BNA) 2035 (N.Y. Sup. Ct. Nov. 1, 1977) (New York

grant modification status where both parents were guilty of child snatching.¹²⁶

Although a majority of the more recent cases follow the Act's mandatory refusal of modification jurisdiction because of "unclean hands," there is still room for maneuvering by the advocate who is able to convince the court that other principles outweigh the petitioner's misconduct. For example, in a recent California case, the appellate court took the position that the UCCJA requires the question of unclean hands to be subordinated to the primary consideration of the child's best interests.¹²⁷ This interpretation, unfortunately, leaves the individual judge with a great deal of discretion to decide jurisdictional matters.

C. *Enforcement of Other State's Decrees*

Although the full faith and credit clause of the Constitution¹²⁸ appears to require all states to enforce judgments rendered by a sister state, the Supreme Court has qualified the literal language of the clause to exclude judgments which are not final, but subject to modification by the court of the original forum.¹²⁹ As the court concluded in *Halvey v. Halvey*,¹³⁰ "a judgment has no constitutional claim to a more conclusive or final effect in the State of the [second] forum than it has in the State where [originally] rendered."¹³¹ Therefore, since a custody decree can be altered

refused to hear petitioner, who had removed the child from its custodial parent, and granted comity to the English custody decree); *Woodhouse v. District Court*, 587 P.2d 1199 (Colo. 1978) (Colorado lacked jurisdiction to modify English decree which had granted custody to the mother from whom the father had abducted the child); *Miller v. Superior Court*, 69 Cal. App. 3d 191, 138 Cal. Rptr. 123 (1977) (California was not the proper forum for modification of Australian custody decree, where the mother had removed the child from Australia, unlawfully depriving the father of his visitation rights).

126. *Williams v. Zacher*, 35 Or. App. 129, 581 P.2d 91 (1978).

127. *Bosse v. Superior Court*, 99 Cal. App. 3d 440, 152 Cal. Rptr. 665 (1979). The custodial mother had hidden the child from the father, refusing visitation for almost three years; however, the court found the interests of the child to be more important than the mother's wrongful acts, so custody remained with the mother. *Accord*, *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974) (although the vigorous dissent is against bending "the processes of this judicial system . . . [for] one who violates a valid order." *Id.* at 384, 527 P.2d at 814 (Pringle, J., dissenting)).

128. U.S. CONST. art. IV, § 1. *See also* 28 U.S.C. § 1738 (1970), enacted by Congress to effectuate the constitutional provision.

129. *Barber v. Barber*, 323 U.S. 77 (1944).

130. 330 U.S. 610 (1947).

131. *Id.* at 614. Since its decision in *Halvey*, the Supreme Court has continued to allow substantial deviation from article IV, § 1 in custody litigation. In *May v. Anderson*, 345 U.S. 528 (1953), full faith and credit did not have to be given to an *ex parte* custody decree. *In personam* jurisdiction was required to bind a parent who had not had her day in court. *Kovacs v. Brewer*, 356 U.S. 604 (1958), held that a change in circumstances since the original decree

by the rendering state's court throughout the minority of the child based on changed circumstances,¹³² other courts are likewise free to modify the original decree without violating the full faith and credit clause. Because a second court is not compelled to enforce a sister state's custody orders, the individual states have liberally modified those decrees.¹³³ Virginia has proven itself to be no exception.¹³⁴

The drafters of the UCCJA, aware of this tendency to disregard a prior court's holding, have provided a two-tier remedy to the conflict by codifying the principles of *res judicata*¹³⁵ and full faith and credit.¹³⁶ Section 20-135 sets out the *res judicata* effect of a custody decree,¹³⁷ binding all the parties once the court has met the jurisdictional prerequisites¹³⁸ and strictly complied with procedural due process.¹³⁹

After a decree satisfies these requirements, recognition and enforcement by other UCCJA states is mandatory.¹⁴⁰ Thus, under Section 20-136 Vir-

would vitiate its entitlement to full faith and credit, reaffirming the holding of *Halvey* that a state which allows modification based on the best interest standard is subject to alteration by other courts. Finally, in *Ford v. Ford*, 371 U.S. 187 (1962), the Court found that Virginia's dismissal of a habeas corpus petition was not entitled to full faith and credit, emphasizing that the decision was neither *res judicata* under Virginia law nor was it rendered with the child's best interests under consideration.

For a more detailed discussion of these four cases, see Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 798-807 (1964).

132. *E.g.*, *Hammers v. Hammers*, 216 Va. 30, 216 S.E.2d 20 (1975); VA. CODE ANN. § 20-108 (Repl. Vol. 1975).

133. Not infrequently, the different states have reached opposite conclusions, often favoring the local resident. *See, e.g.*, *Stout v. Pate*, 120 Cal. App. 2d 699, 261 P.2d 788 (1953), *cert. denied*, 347 U.S. 968 (1954); *Stout v. Pate*, 209 Ga. 786, 75 S.E.2d 748 (1953), *cert. denied*, 347 U.S. 968 (1954).

134. *See* notes 107-09 *supra* and accompanying text.

135. VA. CODE ANN. § 20-135 (Cum. Supp. 1979); UNIFORM ACT § 12.

136. VA. CODE ANN. § 20-136 (Cum. Supp. 1979); UNIFORM ACT § 13.

137. VA. CODE ANN. § 20-135 (Cum. Supp. 1979); UNIFORM ACT § 12.

138. VA. CODE ANN. § 20-126 (Cum. Supp. 1979); UNIFORM ACT § 3.

139. VA. CODE ANN. §§ 20-127, -128 (Cum. Supp. 1979); UNIFORM ACT §§ 4, 5. The plurality opinion in *May v. Anderson*, 345 U.S. 528 (1953), requiring *in personam* jurisdiction over a parent before termination of child custody rights has been discarded by the UCCJA, which instead has used Justice Frankfurter's concurring view that personal jurisdiction over the parent is not constitutionally mandatory. 345 U.S. at 535-36. *See Bodenheimer, Legislative Remedy, supra* note 43, at 1232. The Act ensures procedural due process for custody claimants by requiring that reasonable notice and opportunity to be heard must be given in accordance with VA. CODE ANN. §§ 20-127 and -128 (Cum. Supp. 1979) before any parental or custodial rights are cut off. Actual notice must be given if possible; otherwise substitute service is permissible. *Id.*

140. VA. CODE ANN. § 20-136 (Cum. Supp. 1979); UNIFORM ACT § 13. *See, e.g.*, *Mitchell v. Pincock*, 99 Idaho 56, 577 P.2d 343 (1978) (full faith and credit extended to final California decree, although the child had been in Idaho during the three years of litigation).

ginia will effectively be giving full faith and credit to custody decrees of sister states which have either adopted the UCCJA or similar jurisdictional requirements, or which have taken original jurisdiction under conditions acceptable to the Act.¹⁴¹ The Act provides the additional mechanism of allowing certified copies of out-of-state decrees to be filed in Virginia.¹⁴² Once filed, the decree is entitled to recognition and enforcement "in like manner as a custody decree rendered by a court of this State."¹⁴³ In return, Virginia's decrees will receive commensurate respect in other UCCJA states.

There is one exception to the Act's recognition and enforcement mandate: punitive custody decrees do not need to be accorded the respect due other out-of-state decrees.¹⁴⁴ Where an initial or modification order is made without consideration of the child's best interest, but is purely designed to punish one parent, the court is warranted in refusing to honor its sister court's decree.¹⁴⁵

IV. CONCLUSION

Although it would be unrealistic to expect the Uniform Child Custody Jurisdiction Act to be a complete solution to the complex legal and emotional problems of interstate custody disputes, the Act does provide a

141. UNIFORM ACT § 13, Commissioners' Note. See *Kraft v. District Court*, ____ Colo. ____, 593 P.2d 321, (1979) (although Nebraska was not a UCCJA state, its decree was rendered under similar provisions and was therefore entitled to enforcement). Cf. *Clark v. Clark*, ____ App. Div. ____, 416 N.Y.S.2d 330 (1979) (New York court underscored the strong policy of the UCCJA to favor sister states' custody decrees, even though in this case Virginia's assumption of jurisdiction was questionable). But see *Wenz v. Schwartze*, 5 FAM. L. REP. (BNA) 2813 (Mont., Aug. 1, 1979) (court took great pains to explain its refusal to honor a California decree because of failure to comply with the notice and hearing aspects of the Act; however, it is more likely that the court's real aim was to protect the child from sexual abuse by mother's boyfriend).

142. VA. CODE ANN. § 20-138 (Cum. Supp. 1979); UNIFORM ACT § 15.

143. *Id.*

144. VA. CODE ANN. §§ 20-136, -137 (Cum. Supp. 1979); UNIFORM ACT §§ 13, 14 and Commissioners' Notes. Although not explicitly excluded in the Act itself, the comments and the underlying goals of the Act support such a conclusion. Bodenheimer, *Problems*, *supra* note 1, at 1006. See generally Ehrenzweig, *supra* note 119, at 370, 373-74.

145. *Brooks v. Brooks*, 20 Or. App. 43, 530 P.2d 547 (1975). Virginia has traditionally viewed punishment of the parent as an unacceptable basis for determining custody. See, e.g., *Moyer v. Moyer*, 206 Va. 899, 147 S.E.2d 148 (1966). Cf. *In re Settle*, 25 Or. App. 579, 550 P.2d 445 (1976), *rev'd on other grounds*, 276 Or. 759, 556 P.2d 962 (1976) (the Oregon court noted the distinction between a purely punitive decree and one which may have been based partially on disciplinary considerations). This case is in line with Virginia, which has held that where the child's best interests are served by a decree, the award of custody will be affirmed in spite of the appearance of punishment of a parent. *Rowlee v. Rowlee*, 211 Va. 689, 179 S.E.2d 461 (1971).

systematic approach for resolving many of the procedural issues which may confront a forum court.

Under the Act, if a parent who has moved with his child from another state petitions a Virginia court for an initial award, the court will first determine whether it has jurisdiction over the dispute. Since mere presence of the parties is not enough in the absence of an emergency, the parent and child must either meet the "home state" requirement or have "significant contacts" with the state. Even though Virginia may have jurisdiction, the court must still decide whether it is precluded from exercising its authority to render judgment because there is an action pending in another state, the parent's conduct violates the "clean hands" doctrine, or Virginia would be an inconvenient forum.

If there is already an outstanding custody award from the child's previous state, Virginia must recognize and enforce it if UCCJA standards were met, and must refuse to modify it if the previous forum still meets the Act's jurisdictional requirements. Even if the parent can convince the court that Virginia is the appropriate forum to decide the child's future welfare, the court will need the greatest amount of information possible about the child, his environment, and his past and present relationships to help make an informed, judicious decision. To this end, the provisions of the Act encourage Virginia to initiate communications with the prior forum state, which may include taking depositions or holding hearings in the sister state, as well as the exchange of custody records.

As Virginia joins the thirty-seven other states which have enacted the Uniform Child Custody Jurisdiction Act, it will help "interstate custody law . . . continue to progress from the chaotic conditions that still prevail in many jurisdictions toward a substantial degree of unanimity and harmony."¹⁴⁶

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146. Bodenheimer, *Problems*, *supra* note 1, at 1014.